



How to Effectively Negotiate the Limitation of Liability Clause



Jessica Nguyen, Chief Legal Officer at Lexion

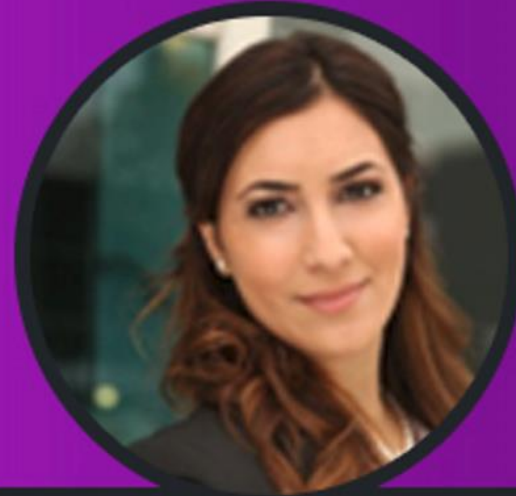
Nada Alnajafi, Founder at Contract Nerds & Author of Contract Redlining Etiquette

About Us



JESSICA NGUYEN

Chief Legal Officer



NADA ALNAJAFI

Founder of Contract Nerds

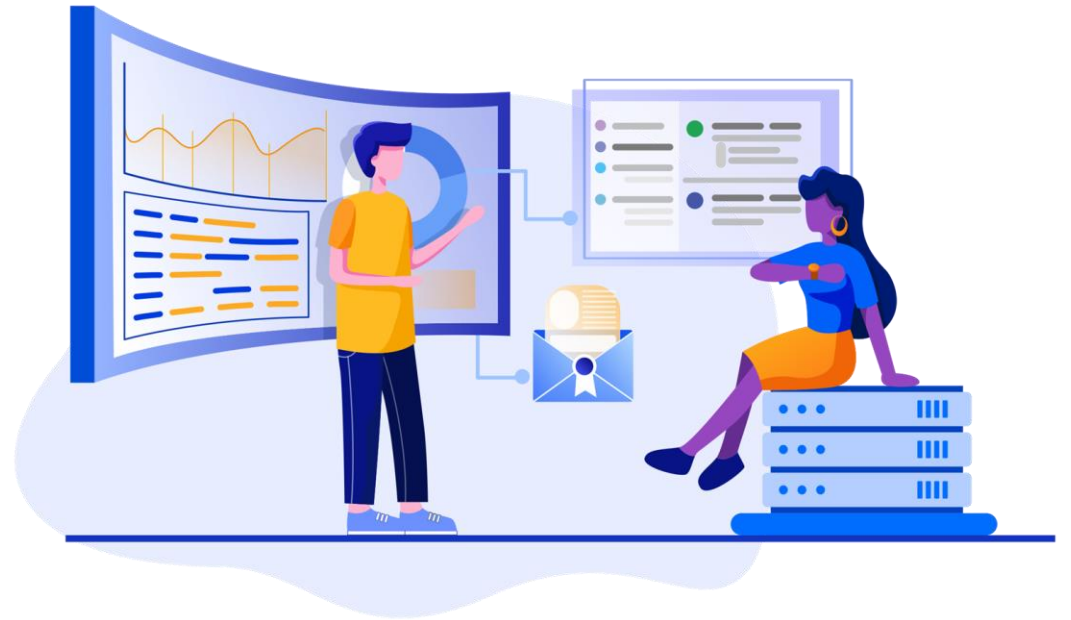


What's a Limitation of Liability (LoL) Clause

01 Limit Type of Damages owed between the contractual parties.

02 Limit Total Dollar Amount of Damages owed between the contractual parties.

03 Set any Exceptions to the Above Limitations.



Sample LoL Clause

10. LIMITATION OF LIABILITY

10.1 Limitation of Liability. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF EACH PARTY TOGETHER WITH ALL OF ITS AFFILIATES ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER AND ITS AFFILIATES HEREUNDER FOR THE SERVICES GIVING RISE TO THE LIABILITY IN THE TWELVE MONTHS PRECEDING THE FIRST INCIDENT OUT OF WHICH THE LIABILITY AROSE. THE FOREGOING LIMITATION WILL APPLY WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY, BUT WILL NOT LIMIT CUSTOMER'S AND ITS AFFILIATES' PAYMENT OBLIGATIONS UNDER THE "FEES AND PAYMENT" SECTION ABOVE.

10.2 Exclusion of Consequential and Related Damages. IN NO EVENT WILL EITHER PARTY OR ITS AFFILIATES HAVE ANY LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT FOR ANY LOST PROFITS, REVENUES, GOODWILL, OR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER, BUSINESS INTERRUPTION OR PUNITIVE DAMAGES, WHETHER AN ACTION IS IN CONTRACT OR TORT AND REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF A PARTY OR ITS AFFILIATES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF A PARTY'S OR ITS AFFILIATES' REMEDY OTHERWISE FAILS OF ITS ESSENTIAL PURPOSE. THE FOREGOING DISCLAIMER WILL NOT APPLY TO THE EXTENT PROHIBITED BY LAW.

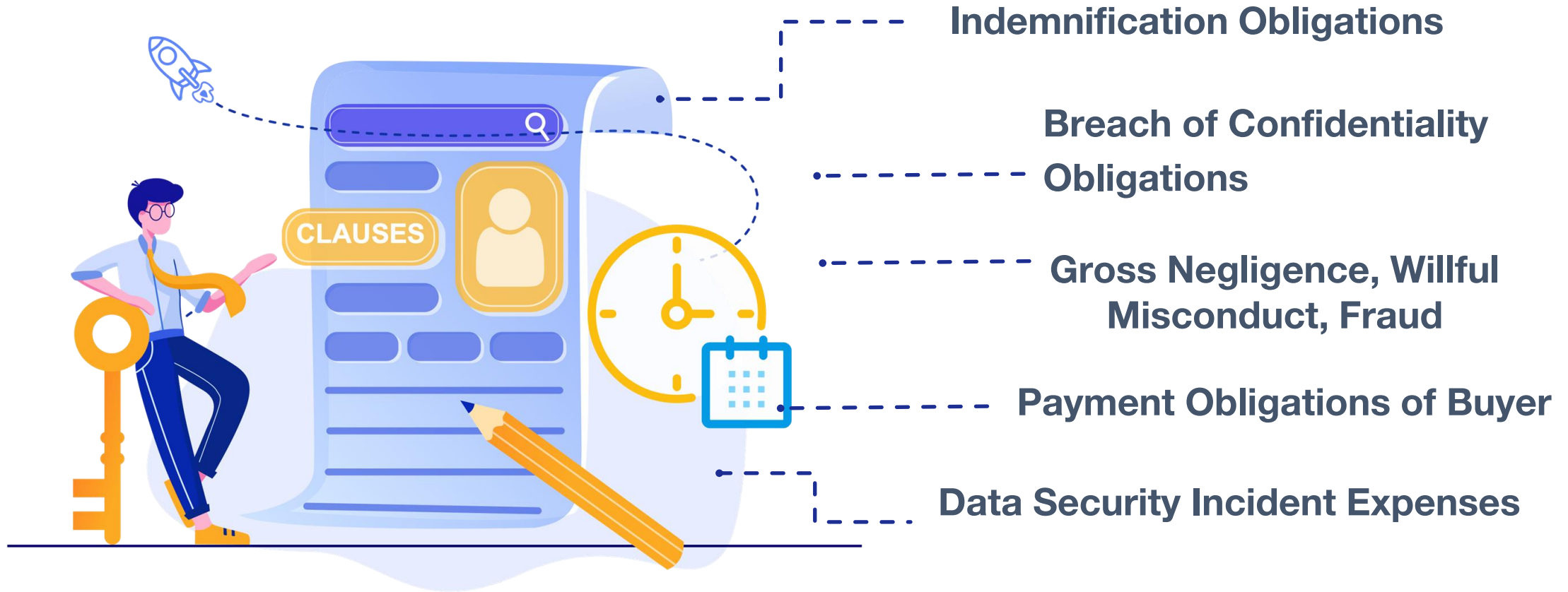
This is from a big B2B SaaS Provider that has a lot of leverage.

How to Negotiate the LoL Clause

1. What's each party's risk?
2. How much are you paying for or charging for the service? How does this relate to the level of risk you've negotiated in the contract? (Standard monetary cap is fees paid/received the prior 12 months)
3. Which party has more leverage?
4. What's the industry standard position for each party for this type of deal and service?



Common Exceptions to LoL



Super Cap on Liability

What are commonly accepted super caps on liability?

“It depends.”

We see different super caps for general liability, IP infringement, indemnification, breach of confidentiality, and data protection/security.



Sorry, this is the best image I could find.



**Let's walk through
redlining a LoL
Clause.**

**Take it away redlining
guru, Nada.**



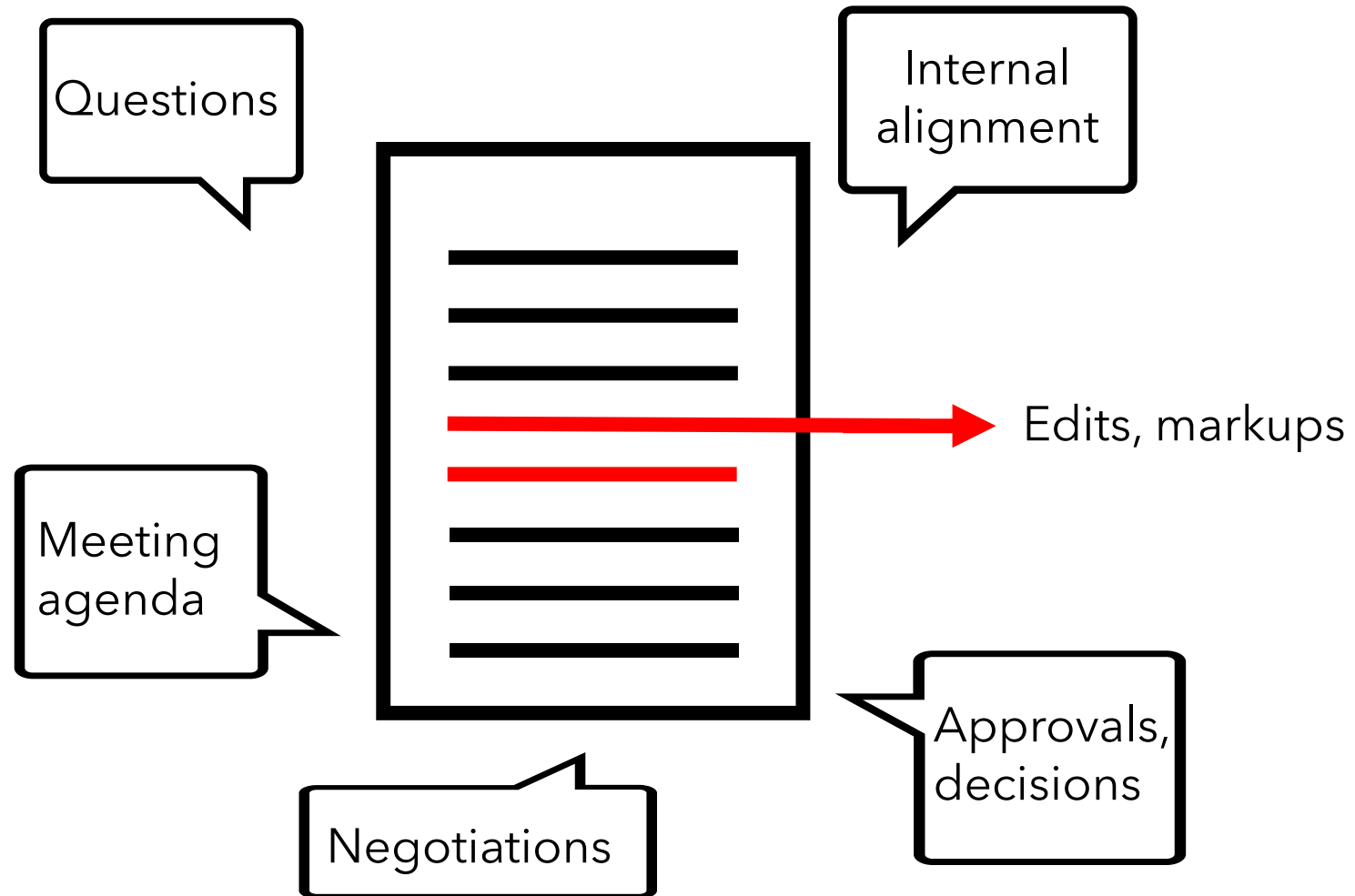
What role does insurance coverage play?

(To additional insure, or not to additional insure? That is the question.)

TIPS FOR REDLINING A LIMITATION OF LIABILITY CLAUSE

LOL clauses are no laughing matter.

REDLINING BASICS



SMARTER REDLINING MEANS

Strategically using redlines and explanatory comments to persuade the other side to accept your proposed changes and drive the negotiation forward in an efficient and effective manner, ultimately resulting in a good contract.

- More acceptances and fewer rejections of proposed changes
- Shorter negotiation cycles and faster closing times
- Stronger negotiation leverage
- Closer internal alignment and trust between the parties
- Reduced contract value leakage
- Better, clearer contracts

REDLINING A LOL CLAUSE

- 1) Gather all the necessary commercial info.
- 2) Reserve negotiation towards the end.
- 3) Break it down.
 - Liable Party(ies)
 - Scope of Liability
 - Monetary Cap
 - Exceptions
- 4) Propose clear redlines in Track Changes using the same sentence structure.
- 5) Add explanatory comments.
- 6) Only change what is necessary.
- 7) Get on a call to negotiate.

RESERVE FOR LATER

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NOTE: We would like to preserve our review of this clause until after the parties have completed commercial and data security negotiations because the final terms will help inform us as to what level of risk we can accept here.

BREAK IT DOWN

10. LIMITATION OF LIABILITY |

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ADD EXPLANATORY COMMENTS

10.3 Super Cap. NOTWITHSTANDING SECTION 10.1 AND 10.2 ABOVE, IN NO EVENT SHALL THE LIABILITY OF SUPPLIER AND SUPPLIER'S AFFILIATES TO CUSTOMER AND CUSTOMER'S AFFILIATES FOR A) BREACH OF SECTION 8.2 OF THE AGREEMENT OR B) A CUSTOMER DATA INCIDENT, EXCEED \$1,000,000.

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We are a public company with 6,000 clients around the world, each of which will be using the Supplier's Services and sharing sensitive PII. Each instance of client data amounts to a risk of data loss that we need to account for. The standard LOL cap of 1x the preceding 12 months' fee would only amount to \$100,000, which is not anywhere near enough to account for the risk of a data breach or loss of our client data. With 6,000 clients at approximately \$150 each in estimated remediation costs per individual, the minimum cap we can agree to is \$1M.

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Given the narrowly defined term "Customer Data Incident" which only covers actual (not threatened) data breaches, this super cap should also apply to Supplier's breach of the reps and warranties covering data security obligations (as set forth in Section 8.2). If Supplier breaches Section 8.2 amounting to damages incurred by Customer, then this super cap would be triggered (regardless of whether there is a Customer Data Incident.)



**Any questions?
We're here to
help and share
lessons learned.**

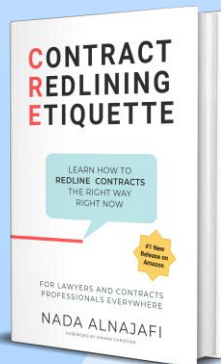
Let's Connect

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The simple & actually adopted legal ticketing and contract management system



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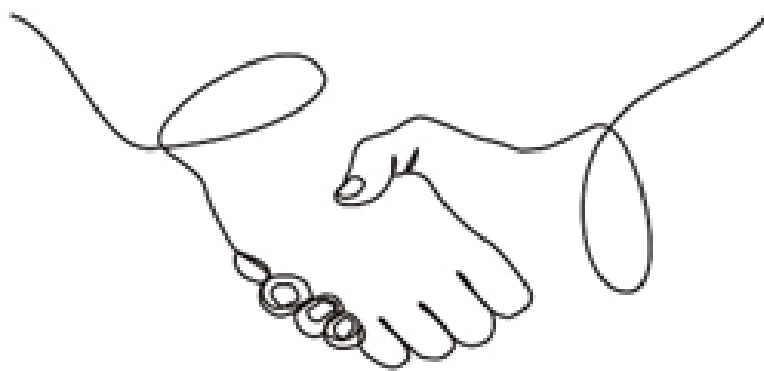
Contract Redlining Etiquette available via Amazon



A Guide to

The 10 Rules of Contract Redlining Etiquette™

By Nada Alnajafi



March 2022



**CONTRACT
REDLINING
ETIQUETTE**



What is Contract Redlining Etiquette?

“Can you review this contract for me? I need it by yesterday.”

If you're a lawyer or contracts professionals who works with contracts, then you're probably in constant search of ways to review, negotiate and close them, faster and more efficiently.

What if I told you that one of the solutions was literally sitting right under your nose this whole time?

If you want...

- More acceptances and fewer rejections of proposed changes
- Shorter negotiation cycles and faster closing times
- Closer internal alignment and trust between the parties
- Stronger negotiation leverage
- Reduced contract value leakage
- Better, clearer contracts

Then it's time to level up your redlining skills!

Contract Redlining Etiquette™ provides the **first and only** uniform set of rules about redlining and negotiating contracts. You no longer have to learn this important skill solely on the job. Whether you are new to contracts or have negotiated hundreds of them, the 10 rules of Contract Redlining Etiquette will help you leverage the power of redlines to drive contract negotiations forward efficiently and effectively. There's redlining, and then there's **smarter** redlining.

This guide provides a high-level overview of the 10 rules of Contract Redlining Etiquette. For more contract redlining best practices, check out the [brand-new book](#) on Contract Redlining Etiquette in paperback and Kindle, available now on Amazon.





Rule #1 on Comments

Always accompany redlines with explanatory comments.

People are more likely to agree with you when they understand you. That's why it is so important to use explanatory comments during contract negotiations.

So don't just assume that the other party knows why you proposed, rejected, or countered a change to the contract. Instead, explain why you proposed what you did using a "because" statement. Give examples and share references where helpful. Don't be afraid to include both business and legal justifications to support your position.

For example, if you have to reject the other party's clause, explain the reasoning like this: "We can't agree to this clause because, as a new startup, we do not have the resources to comply with this requirement."

You don't need to use explanatory comments:

- When accepting a proposed change.
- Minor, obvious, or formatting changes.
- Longer explanations that would be better explained in an email or over the phone in a live negotiation (see CRE Rules #3 and #4).
- Strategic use of silent redlines (see CRE Rule #2).



If you're ever unsure, err on the side of using explanatory comments. While they are more work upfront, they save a lot of time on the backend.



Rule #2 on Silent Redlines

Leverage silent redlines with difficult counterparties.

Silence is undoubtedly a powerful negotiation tool in live negotiations. But contract negotiations are not usually live; they usually begin with an exchange of redlines via email. So how can we utilize silence during the redlining process?

When responding to a counterparty's redline, you can either accept the change, reject the change, or make a counteroffer. A silent response (aka the lack of a visible response) to your counterparty's proposed redline could suggest implied acceptance.

On the other hand, silent redlines can be powerful when used to assert your own proposed redlines. **"Silent redlines"** are the strategic absence of an explanatory comment on a change you made using your own redlines. The difference is that you are proposing the redline, not responding to it.

Use silent redlines:

- With adversarial counterparties or negotiations (litigation or business dispute).
- In David vs. Goliath scenarios with imbalanced negotiation power between the parties.
- If your previous redlines or comments were ignored or deleted.
- Where negotiations are going in circles and you need a pattern-interrupt or a break.
- When a term is so offensive or out of the norm.

Don't use silent redlines:

- Too often or when you're angry.
- To get under your counterparty's skin.
- Where it would be culturally insensitive or confusing due to language barriers or other cultural considerations.



Silent redlines are a delicate negotiation strategy that should only be used to move the negotiation forward.



Rule #3 on Email Exchanges

One email exchange, then switch to live negotiations.

To facilitate an efficient and speedy contract negotiation, you should exchange redlines as few times as possible during the contract review process. As a rule of thumb, you should exchange redlines once (usually via email), and then switch to live negotiations over a virtual meeting or phone call.

Look out for these signals

- Multiple back-and-forth comments about the same redline
- Sensing frustration from the other party
- Email responses are delayed
- An urgent or high-priority contract
- Pressure from the business
- Quarter-end, going on leave or vacation, or some other impending deadline

You might need more or less exchanges based on the circumstances:

- Short and simple contracts may not require a live negotiation.
- Long or complex contracts may require two or more email exchanges before the parties are ready to discuss live.
- Urgent or high priority contracts may require you skipping the email exchange altogether and hopping on the phone right away.
- Logistical issues when dealing with international parties in different time zones or a large group of stakeholders.
- To confirm or memorialize important points that you need to keep record of for compliance or CYA purposes.



The key is to switch modes of communication in order to move the negotiation forward at a steady pace.



Rule #4 on Calls

Use the latest redlines to run the negotiation call.

The goal of the contract negotiation call (virtual or phone) is to answer questions, make decisions, and close out as many open redlines as possible. To do this, make sure you are prepared for the call.

Since you, as the contracts professional, are the lead on the contract negotiation, you will most likely be the meeting organizer and the meeting leader. So the success of the call is in your hands. To achieve maximum efficiency in your contract negotiation calls, use your redlines as an agenda, take diligent notes, and help drive decisions.

To make sure you are setup for success, make sure you are prepared:

- Meet with your internal clients prior to the negotiation call
- Invite no more than 6 people
- Include the business and legal (or contracts) counterparts from both sides
- Review the latest redlines prior to the call
- Take good notes and capture decisions on redlines
- Screen share the latest redlines and use the redlines to guide the call



Lawyers should be mindful of rules of professional conduct around communications and privilege.

Get ahead of the game.

If you're new to contracts, don't wait for law schools to add this to their curriculum or rely on your boss to show you the ropes. Learn how to redline contracts the right way, right now!

[Buy on Amazon](#)





Rule #5 on Internal Redlines

Leverage internal redlines to build internal alignment.

When we think of the contract negotiation process, most of us think only of the external legal negotiation and often neglect the importance of the internal negotiation. The difference between external and internal redlines is the audience. External redlines are drafted by the contract negotiator for an external audience, e.g., the counterparty's business or legal representatives.

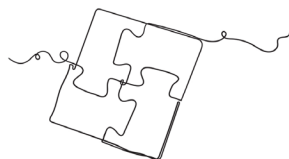
"Internal redlines" are drafted for an internal-only audience, e.g., your internal business clients, stakeholders, and subject matter experts. These types of redlines are used to gather information, requirements and approvals, from your internal clients, stakeholders, and subject matter experts. They typically involve clarification questions, flagging risks, and noting approvals or rejection of commercial terms. Once you're done with internal negotiations, delete all internal redlines before sending the contract out to your counterparty.

Stay organized with the color-coding method:

Make sure you clearly distinguish between external and internal redlines to avoid accidentally sending internal redlines to external parties. One way to keep your external vs. internal redlines organized is to use a simple color-coding technique.

If you are redlining in Word, you can simply highlight comments to indicate which audience the comment is intended for. Highlight your comments with different colors to help identify which comments are internal vs. external.

- Blue highlight** = Redlines to the Business (aka internal redlines)
- Yellow highlight** = Redlines to the Other Party (aka external redlines)
- Green highlight** = Redlines with notes to myself, or that I'll come back to later



Use internal redlines to build internal alignment, collaboration, and understanding with your business clients.



Rule #6 on Re-Drafting

When proposing a redline, re-draft clear(er) and reasonable corresponding language.

Part of negotiating contracts involves drafting or re-drafting contracts. This is an opportunity to improve the template or apply modern contract drafting practices.

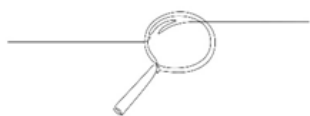
Use redlines to re-draft clearer contracts by:

- Removing legal archaisms like “whereas”
- Applying plain language and contract design principles
- Updating stale references to outdated laws
- Fixing typos and incorrect section numbering
- Moving sections around and retitling section headers for more clarity
- Adding defined terms for words used more than a couple times in the contract

Propose terms to match your request:

The party requesting a substantive change should take the lead in proposing the corresponding language. Don't propose a revision and expect your counterparty to craft language that is supposed to be in your favor. They are not mind readers or scribes. If you ask for something, put in the work to draft suitable and clear contractual language to correspond with your request.

The more work you put into your redlines, the more likely they are to be accepted.



When you re-draft contractual language, make sure the proposed terms are clear and reasonable.



Rule #7 on Tracking Changes

All redlines must be visible until final agreement.

The contract negotiation process requires logistical collaboration between the parties because we are all working from and redlining the same document. This, in turn, necessitates an inherent level of trust and expectation of transparency. But our practice has a problem—a *transparency problem*.

How many times have you received a version of a contract that had hidden redlines? I'd bet the answer is, too many times. We can and need to use redlines to solve this major problem.

When introducing change in a contract (i.e., proposing to alter a clause, term, or section)...

Keep your "Track Changes" or "Suggesting" mode on at all times. All changes should be communicated within the document. It is ok to reiterate or elaborate points via email or in accompanying business documents, but every proposed change and accompanying explanatory comments should be visibly tracked within the four corners of the document. Avoid cumulative markups; instead, close out redlines and comments that are resolved.

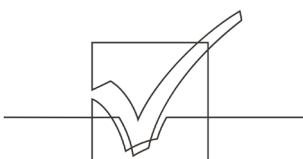
When responding to change (i.e., deciding whether to accept, reject, or continue discussions regarding a proposed change)...

Keep your "Track Changes" or "Suggesting" mode on at all times.

If your counterparty's redlines are something you readily agree with, you can simply accept their redlines without making a comment. Otherwise, if you don't accept the change(s) as-is, you should respond with your counteroffer both in the redlines and in the explanatory comments (see CRE Rule #1). Be sure to strike out redlines that you disagree with rather than simply rejecting them to avoid disappearing redlines.

Increasing transparency in our practice leads to:

- Smoother, faster, and more efficient contract negotiations.
- More bargaining power in negotiations.
- Less confusion, clutter, and human errors.
- More trust between you and your counterparties.



Keep all redlines marked and visible until they are resolved by the parties.



Rule #8 on Finalizing

Control, verify, and clean the final version of a contract before requesting signatures.

To prepare the final version for execution, make sure you validate that the contract reflects the exact terms you agreed to. A fast way to do this is to use a document comparison tool to compare the initial draft with the final version, and reference previous redlines to cross-check the changes.

Control

Always maintain control over your version of redlines throughout the contract review and negotiation process and when preparing the final version for execution. This will help streamline the verification process and reduce the chance of inconsistencies or errors.

Verify

Whether the contract was on your paper or your counterparty's paper, make sure to verify that the final version is a true and accurate representation of the terms agreed upon during negotiations. That means not only double checking that your counterparty applied all the changes they were responsible for applying, but also holding yourself accountable to reflect the changes you agreed to during negotiations.

Clean

It may sound redundant, but cleaning is an important stage of preparing the final version of a contract. In fact, entire case findings can turn on a single drafting or formatting error, like the placement of a comma or redundancy. Don't let a mere oversight or rush job haunt you later on down the line.



Before sending a contract out for signature, make sure it is the right and expected version of the contract.



Rule #9 on Bias & Inclusivity

Eliminate contract biases and promote inclusivity.

Identify and eliminate contract biases from contracts and the contracting process to improve contract negotiations and the relationship between the contracting parties.

Language Bias

When the contract drafter assumes the other party is as fluent in English and English “legalese” as the contract drafter, this can result in a misinterpretation of the terms and intent of a contract.

To eliminate language bias from contracts: create a valid non-English translation of the English contract; use visual contracts that incorporate images alongside or even replace text; conduct the contract negotiation via email instead of phone to slow the pace and develop genuine understanding between the parties; replace English legalese with English plain language that even a non-native English speaker could understand.

Gender Bias

As the world moves towards gender neutrality, our contracts should, too.

To eliminate gender bias from contracts: move away from third-person pronouns altogether; use gender fair or gender-neutral language throughout the contract; don’t use a gender catch-all clause as that only reinforces gender stereotypes; if necessary, ask clients or counterparties what their preferred gender pronoun is.

Resource Bias

Not all parties have the same access to legal technologies, such as electronic signature tools or contract lifecycle management (CLM) platforms. Therefore, we should not assume that everyone can review contracts as quickly or efficiently as we can.

To eliminate resource bias from contracts: offer to create the final clean template for signature instead of asking the other party to; expect more time for contract review, negotiation and execution; leverage your tools for the other party’s gain.



It is important to be mindful of implicit biases to avoid offending a party or prolonging the contract negotiation process.



Rule #10 on Technology

Incorporate technology to assist with smarter redlining.

So long as you are not using an actual red pen to redline contracts (like I did in law school), you are already using technology to redline. Technology is the new red pen, so to say.

Imagine a world where your templates are clear and reasonable, your redlining skills are as efficient as ever, and you are utilizing technology to assist you with the negotiation process. That is the optimal end-to-end solution for better and faster contracts! As modern-day lawyers and contracts professionals, we need to embrace technology and use it to our advantage.

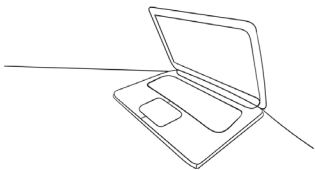
How will technology change the future of redlines?

Advancements in legal technology have solved many of our industry's largest contracting problems. Such as a centralized contract repository, streamlined intake forms, tracking approvals, automating electronic signatures, etc.

But one phase of the CLM process that remains largely unsolved by technology is the contract negotiation phase. Why? Because **negotiation is an art**, not a science. That is why the negotiation phase is the most difficult phase of the contracting process to automate.

In the Contract Redlining Etiquette™ book, we hear from leading contract management system providers that are automating the redlining and negotiation phase:

- Browser-Native Collaboration by Richard Mabey, CEO of [Juro](#)
- Digital Predictive Redlines by Jerry Levine, GC of [ContractPodAi](#)
- Alive and Smart Contracts by Olga Mack, CEO of [Parley Pro](#)



The future of redlines is bright! Be sure to watch CLM demos on an ongoing basis to stay updated on industry trends.



ARE YOU READY TO CHANGE YOUR ~~LIFE~~ REDLINES?!

Click [HERE](#) to purchase on Amazon in Kindle or paperback.

What people are saying about the book!

"This book is exactly what I was looking for to help train my team on improving our contract negotiations process and closing times. We are already seeing results from applying these practical rules to our negotiations. Nada makes the world of redlines easy, simple, and fun." – *Megan Lutes, General Counsel of Glowforge*

"During this time of goodwill toward others, if we all knew how to redline properly, the world would truly be a better place." – *Sterling Miller, 3x General Counsel and Author of Ten Things You Need to Know As In-House Counsel*

"Nada presented Contract Redlining Etiquette to my law school course on The Role of In-House Counsel. My students found her presentation engaging and fun, and her materials useful and easy to follow. The session was one of the students' favorite overall and I am looking forward to including her materials in my classes going forward." – *Maja Larson, Adjunct Professor and ex-General Counsel*

"When researching best practices, we leaned on Nada's Contract Redlining Etiquette rules to create our internal editing and negotiation processes. I highly recommend this book for anyone who works with contracts of any kind." – *Barbara Elias, Beyond Paralegals*

About the Author



Nada Alnajafi is an award-winning in-house attorney, author of [Contract Redlining Etiquette](#), and founder of the [Contract Nerds blog](#). Over the past 15 years, Nada has worked for companies of various sizes in various industries representing clients on both the buy side and sale side in all types of commercial and technology deals. During that time, she has drafted, reviewed, redlined, and negotiated thousands of contracts.